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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, AUSTIN RUGG, and
ANA SANDERS, individually and on behalf
of all others similarly situated,

Plaintiffs.

V.

NORMANDIN'S, a California corporation,
d/b/a NORMANDIN CHRYSLER JEEP
DODGE RAM, and ONECOMMAND, INC.,

Defendants.

NO. 5:14-cv-03007-EJD-HRL

**PLAINTIFFS' NOTICE OF MOTION
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
ATTORNEYS FEES, COSTS AND
SERVICE AWARDS**

JURY TRIAL DEMAND

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DATE: May 1, 2010

DATE: March 29,
TIME: 10:00

TIME: 10:00 a.m.

TO: DEFENDANTS NORMANDIN'S, a California corporation, d/b/a NORMANDIN CHRYSLER JEEP DODGE RAM, and ONECOMMAND, INC., AND THEIR ATTORNEYS OF RECORD:

PLAINTIFFS' NOTICE OF MOTION AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS FEES AND COSTS
Case No. 5:14-cv-03007-FJD-HRL

1 PLEASE TAKE NOTICE that on March 29, 2018, at 10:00 a.m., in Courtroom 4, 5th
2 Floor, of the U.S. District Court for the Northern District of California, 280 South 1st Street, San
3 Jose, California, 95113, Plaintiffs will move for attorney's fees and costs.

4 This motion will be based on: this Notice of Motion, the following Memorandum of
5 Points and Authorities, Declaration of Beth E. Terrell, Joint Declaration of Rob Williamson and
6 Kim Williams, Declaration of Michael F. Ram, Declaration of Alan L. Brinker, the records and
7 file in this action; and on such other matter as may be presented before or at the hearing of the
8 motion.

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27 PLAINTIFFS' NOTICE OF MOTION AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR
ATTORNEYS FEES AND COSTS
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I. INTRODUCTION

Counsel¹ submit this motion for an award of \$150,000 in attorneys' fees and out-of-pocket costs, and service awards for Plaintiffs Alan Brinker, Austin Rugg, and Ana Sanders for services they rendered to the Settlement Class by stepping forward to bring this case. Pursuant to the Settlement Agreement, Defendants Normandin's and OneCommand (collectively, "Defendants") will pay Court-awarded attorneys' fees, costs, and service awards in addition to the relief Defendants will provide to Settlement Class Members. Thus, approving counsel's request will in no way reduce the relief available to Settlement Class Members.

Counsel spent over 1,200 hours prosecuting this action, which involved extensive discovery and discovery disputes, depositions, a fully-briefed motion for class certification, a motion to dismiss that was initially granted and subsequently reversed upon reconsideration, and third-party discovery. All told, counsel have incurred \$745,920 in fees.² In addition, counsel have paid \$41,065.40 in out-of-pocket costs for a total of \$786,985.40. However, counsel seek only \$150,000, a fraction of their total lodestar and costs. Where, as here, a settlement does not create a “common fund,” courts rely on the “lodestar” method of calculating a reasonable fee, which requires the court to multiply the reasonable hours expended on the litigation with a reasonable hourly rate.

Further, both equitable principles and a “percentage-of-the fund cross check” confirm that counsel’s requested fee is reasonable. Each of the 8,313 members of the Settlement Class will receive either a \$90 certificate or a \$40 cash payment; Defendants will separately pay all administration expenses, which are estimated at \$29,000; and, if approved, Defendants will pay a total of \$12,000 in service awards to the Plaintiffs. Depending on whether Settlement Class

¹ Class Counsel Terrell Marshall Law Group, PLLC bring this motion on its own behalf, and on behalf of co-counsel, Michael F. Ram, Rob Williamson, and Kim Williams.

² In their motion for preliminary approval, Plaintiffs represented that fees were approximately \$660,000 and costs were approximately \$40,000. These were estimates. After more complete analysis of time entries, Plaintiffs' lodestar is slightly higher than originally estimated. However, counsel's request for \$150,000 in attorneys' fees is unaffected by the higher lodestar number.

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1 Members submit claims for certificates or cash, the Settlement's total value ranges from
 2 \$523,520 to \$939,170.³ The benefit counsel achieved for the Settlement Class in light of the risks
 3 of continued litigation supports counsel's requested fee.

4 Counsel's request for a service award to the named Plaintiffs also should be granted. Mr.
 5 Brinker has actively participated in this action since its inception. He has responded to written
 6 discovery requests, actively assisted in counsel's investigation, sat for a deposition, attended
 7 mediation, and was ready and willing to testify at trial. A \$10,000 service award for his efforts is
 8 appropriate. Plaintiffs Rugg and Sanders also stepped forward to represent the Settlement Class
 9 and were prepared to participate as needed in this litigation on behalf of the Settlement Class.
 10 \$1,000 awards for these two later-added Plaintiffs are reasonable.

11 For these reasons, and as detailed below, counsel respectfully request that the Court grant
 12 their motion and award fees and costs in full, as well as payment of the service award to
 13 Plaintiffs.

14 **II. STATEMENT OF FACTS**

15 **A. Counsel's work**

16 Normandin's owns and operates an automobile dealership in San Jose. OneCommand, an
 17 automotive marketing and advertising company, executed telephone campaigns on Normandin's
 18 behalf. Plaintiffs allege that Defendants made calls to their cell phones without their consent, and
 19 that the calls violated the TCPA, which prohibits calls made through the use of an automatic
 20 telephone dialing system or prerecorded voice to a cellular telephone number. *See* 47 U.S.C.
 21 § 227(b)(1)(A). On July 1, 2014, Plaintiff Alan Brinker filed a class action complaint, seeking to
 22 represent a nationwide class of consumers who received automated or prerecorded calls from
 23 Normandin's.

24
 25
 26 ³ \$523,520 = Cash Value (\$332,520) + Fees and Costs (\$150,000) + Service Awards (\$12,000) +
 27 Notice Expenses (\$29,000); \$939,170 = Cash Value Certificates (\$748,170) + Fees and Costs
 (\$150,000) + Service Award (\$12,000) + Notice Expenses (\$29,000).

1 Counsel have worked for more than three years to prosecute this action and obtain a
 2 settlement for the benefit of the Settlement Class. *See* Declaration of Beth E. Terrell in support of
 3 Motion for Attorneys' Fees, Costs, and Service Awards ("Terrell Decl.") ¶ 23. Shortly after
 4 filing, counsel propounded written discovery requests designed to elicit information regarding
 5 Normandin's telemarketing policies and practices, the scripts Normandin's used, and any
 6 electronic records that Normandin's maintained documenting the calls. *Id.* Through these
 7 requests, counsel learned that Normandin's retained a third-party vendor called OneCommand to
 8 place the calls and that OneCommand maintained records relating to calls placed on
 9 Normandin's behalf. *Id.*

10 To obtain these crucial electronic call records, which identify the telephone number to
 11 which the call was placed as well as the call date, counsel sent a subpoena to OneCommand.
 12 OneCommand initially produced a list of approximately 5,800 cellular telephone numbers that
 13 received the same types of calls as those received by Plaintiff Brinker. *Id.* ¶ 24. However,
 14 OneCommand did not produce information relating to these calls, including the number of calls
 15 placed to each telephone number, and the dates of the calls. *Id.* Rather than initiate an action to
 16 enforce the subpoena in Ohio, where OneCommand is based, Plaintiff Brinker successfully
 17 moved to add OneCommand as a Defendant. *Id.* Following Plaintiff Brinker's motion to compel,
 18 the Court ordered OneCommand to produce complete calling data, which it did, identifying
 19 8,313 cell phone numbers that were called by OneCommand on Normandin's behalf on or after
 20 October 16, 2013. *Id.*

21 Plaintiffs also reviewed approximately seventy-five thousand pages of documents
 22 produced by Normandin's and OneCommand, deposed three key individuals responsible for
 23 Normandin's operations, and deposed two key individuals responsible for OneCommand's
 24 operations, OneCommand's Chief Compliance Officer and Vice President of Information
 25 Technology. *Id.* ¶ 25. Because Defendants blamed one another for the alleged failure to comply
 26 with the TCPA, Plaintiffs also engaged in third party discovery directed at understanding the
 27

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1 contractual relationship between Defendants and any controlling or affiliated companies that
 2 could potentially bear responsibility for Plaintiffs' claims. *Id.* ¶ 26.

3 On April 20, 2016, the parties voluntarily participated in a full-day mediation with
 4 experienced JAMS mediator and former Chief Magistrate Judge of the Northern District of
 5 California, Edward A. Infante. *Id.* ¶ 27. The parties submitted detailed mediation briefs and,
 6 during the mediation session, discussed their relative views of the law and the facts and potential
 7 relief for the proposed class. *Id.* Defendants emphasized their position that proposed class
 8 members had consented to receive informational calls by providing their telephone numbers to
 9 Normandin's, or consented to receive telemarketing calls by providing written prior express
 10 consent in sales contracts or leases. *Id.*

11 The parties made significant progress toward resolution during their mediation with
 12 Judge Infante, but the mediation did not result in an agreement. *Id.* ¶ 28. Afterward, the parties
 13 continued to work toward settlement, but also steadfastly litigated the case. *Id.* Just weeks prior
 14 to mediation, Plaintiffs moved for class certification, and also to amend the complaint to add
 15 Plaintiffs Austin Rugg and Ana Sanders and new TCPA claims based on calls made to
 16 individuals on the National Do-Not-Call Registry. *Id.*

17 In addition, one month after mediation, the Supreme Court released its decision in
 18 *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), in which it held that a consumer could not satisfy
 19 the injury-in-fact demands of Article III standing by alleging a bare procedural violation of the
 20 Fair Credit Reporting Act. *Id.* ¶ 29. In response, OneCommand moved to dismiss for lack of
 21 Article III standing. Plaintiffs opposed the motion. *Id.* During the four-month period in which the
 22 motion was pending, the parties came very close to reaching a settlement. *Id.* Those negotiations
 23 came to a standstill when the Court granted OneCommand's motion. *Id.* Following the Court's
 24 April 2017 order granting Plaintiffs' request for reconsideration, the parties were finally able to
 25 reach agreement on all material terms. *Id.*

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1 **B. The Settlement**

2 Under the Settlement Agreement, those Settlement Class Members who submit valid,
 3 timely claims will receive their choice of a \$90 certificate redeemable at Normandin's for the
 4 one-time purchase of goods and/or services, or for cash in the amount of \$40. The terms of the
 5 Settlement Agreement are more fully laid out in Plaintiffs' Motion for Preliminary Approval,
 6 Dkt. No. 165, and in the Settlement Agreement, Dkt. No. 166, Ex. 1.

7 Counsel achieved an excellent result for the Settlement Class. Early claims rate data
 8 indicates that Settlement Class Members believe the Settlement offers them a valuable benefit.
 9 Out of 8,313 members of the Settlement Class, 3,314 had submitted claims as of January 12,
 10 2018, representing a claims rate of nearly 40%, with more than one month remaining before the
 11 February 13, 2018 deadline. Terrell Decl. ¶ 30. No Settlement Class Members have opted out or
 12 objected. *Id.*

13 The Settlement Agreement provides that in connection with obtaining preliminary and
 14 final approval of the Settlement Agreement, Plaintiffs' counsel will request that the Court
 15 approve an award of \$150,000 for attorneys' fees and costs to compensate and reimburse them
 16 for all of the work already performed in this case and all of the work remaining to be performed
 17 in connection with the Settlement. Dkt. No. 166, Ex. 1, § III.J. The enforceability of the
 18 Settlement is not contingent on Court approval of an award of attorneys' fees and costs. *Id.*
 19 Defendants will pay any Court-awarded attorneys' fees and expenses separate and apart from the
 20 relief to the Settlement Class. *Id.*

21 As part of the Settlement Agreement, Defendants have also agreed to pay service awards
 22 to Plaintiffs, subject to the Court's approval. Plaintiffs request that the Court award Mr. Brinker a
 23 service award of \$10,000. *Id.* § III.I. This award will compensate Mr. Brinker for his time and
 24 effort serving as a class representative, for the risks he undertook in prosecuting the case, and the
 25 substantial time he spent working with counsel, sitting for a deposition, responding to discovery
 26 requests, attending mediation, participating in settlement discussions, and thoroughly reviewing
 27 the Settlement Agreement. *See* Declaration of Alan Brinker in support of Motion for Attorneys'

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1 Fees, Costs, and Service Awards (“Brinker Decl.”) ¶¶ 2-7. Plaintiffs also request that the Court
 2 award Mr. Rugg and Ms. Sanders service awards of \$1,000 each for the risks they incurred in
 3 prosecuting the case. Dkt. No. 166, Ex. 1, § III.I. Defendants will make any service award
 4 payments separate and apart from the other relief for the Settlement Class. *Id.*

5 **III. ARGUMENT AND AUTHORITY**

6 **A. Counsel are entitled to recover reasonable attorneys’ fees.**

7 Counsel are entitled to a fee award because they have created a substantial benefit for the
 8 Settlement Class. *Hall v. Cole*, 412 U.S. 1, 5 (1973) (finding award of attorneys’ fees appropriate
 9 where “the plaintiff’s successful litigation confers ‘a substantial benefit on the members of an
 10 ascertainable class’”) (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392–95 (1970)); *Lewis*
 11 *v. Anderson*, 692 F.2d 1267, 1270 (9th Cir. 1982) (finding the “substantial benefit doctrine ...
 12 permits a plaintiff to recover attorneys’ fees if his action has conferred a substantial benefit upon
 13 a class”).

14 Here, the Settlement provides substantial benefits to Settlement Class Members. Those
 15 Settlement Class Members who submit valid, timely claims will receive their choice of a \$90
 16 non-expiring certificate redeemable at Normandin’s for the one-time purchase of goods and/or
 17 services, or for cash in the amount of \$40. This results in a total potential benefit to the
 18 Settlement Class of \$332,520 to \$748,170. Early claims rate data indicates that Settlement Class
 19 Members view the Settlement as providing a valuable benefit. Out of 8,313 members of the
 20 Settlement Class, 3,314 had submitted claims as of January 12, 2018, representing a claims rate
 21 of nearly 40%, with more than one month remaining before the February 13, 2018 claims
 22 deadline. Terrell Decl. ¶ 30. No Settlement Class Members have opted out or objected. *Id.*
 23 Counsel are entitled to reasonable attorneys’ fees and costs for obtaining these benefits for the
 24 Settlement Class.

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 27 PLAINTIFFS’ NOTICE OF MOTION AND MEMORANDUM OF POINTS
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1 **B. Counsel's fee request is the result of arms' length negotiations and does not reduce**
 2 **the class relief in any way.**

3 “In a certified class action, the court may award reasonable attorney's fees and nontaxable
 4 costs that are authorized by law or by the parties' agreement.” Fed. R. Civ. P. 23(h). Thus, when
 5 attorneys' fees and costs are requested by counsel for the class, “courts have an independent
 6 obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties
 7 have already agreed to an amount.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
 8 941 (9th Cir. 2011). That said, “[a] request for attorney's fees should not result in a second major
 9 litigation. Ideally, of course, litigants will settle the amount of a fee.” *Hensley v. Eckerhart*, 461
 10 U.S. 424, 437 (1983); *see also In re Sony SXRD Rear Projection Television Class Action Litig.*,
 11 No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *15 (S.D.N.Y. May 1, 2008) (“The negotiation of
 12 attorneys' fees is generally encouraged.”).

13 It is especially appropriate that the fee request not result in additional major litigation in
 14 cases, such as here, in which the fee was negotiated *after* the benefits to the Settlement Class,
 15 and will be paid by Defendants separately from and without reducing the benefits to the
 16 Settlement Class. Terrell Decl. ¶ 34. When attorneys' fees are to be paid out of an agreed
 17 common fund, defendants have no incentive to minimize those fees. In this case, by contrast,
 18 Defendants had every interest in minimizing the fee, to keep down its total payout. Counsel's
 19 interest was in maximizing the amount. Under these circumstances, where the fee was negotiated
 20 at arm's length, “the court need not inquire into the reasonableness of the fees . . . with precisely
 21 the same level of scrutiny as when the fee amount is litigated.” *Staton v. Boeing Co.*, 327 F.3d
 22 938, 966 (9th Cir. 2003).

23 Moreover, any reduction in the fee and cost amount awarded to counsel would not benefit
 24 the Settlement Class, but would instead benefit only Defendants. The Court's fiduciary
 25 obligation to the Settlement Class Members does not include an obligation to protect
 26 Defendants' interests, since they are represented by counsel and agreed to the negotiated fee
 27 amount.

1 **C. The lodestar method confirms that the requested fee is reasonable.**

2 Even though a reduction in the requested fee would not benefit the Settlement Class, the
 3 Court must still decide whether the requested fee is reasonable. *In re Bluetooth Headset Prods.*
 4 *Liab. Litig.*, 654 F.3d at 941 (finding that a court must “assess fully the reasonableness of the fee
 5 request”) (citing *Staton*, 327 F.3d at 963-64)). Where, as here, a defendant pays the fees
 6 separately, the lodestar method is generally preferred. *See Hanlon v. Chrysler Corp.*, 150 F.3d
 7 1011, 1029 (9th Cir. 1998) (noting courts use the lodestar method where it is difficult to
 8 determine the value of the settlement); *Deloach v. Philip Morris Cos.*, No. 1:00CV01235, 2003
 9 WL 23094907, at *4 (M.D.N.C. Dec. 19, 2003) (finding it more appropriate to use the lodestar
 10 methodology in awarding attorneys’ fees where no common fund exists).

11 The lodestar method provides courts an objective basis upon which to determine the
 12 value of the services provided by counsel. *Hensley*, 461 U.S. at 433. To calculate a lodestar
 13 amount, a court multiplies the number of hours reasonably expended by the reasonable hourly
 14 rate. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 n.2 (9th Cir. 1994)
 15 (citations omitted). The court may then enhance the lodestar with a “multiplier,” if necessary, to
 16 arrive at a reasonable fee. *Id.*; *see also Hanlon*, 150 F.3d at 1029 (a lodestar figure “may be
 17 adjusted upward or downward to account for several factors including the quality of the
 18 representation, the benefit obtained for the class, the complexity and novelty of the issues
 19 presented, and the risk of nonpayment”).

20 Here, counsel seek an award of \$150,000 in fees and costs, which represents a negative
 21 multiplier of 0.19. In other words, counsel seek substantially less than the \$786,985,40 in fees
 22 and costs they have incurred prosecuting this action to date. For the following reasons, counsel’s
 23 requested fee is reasonable.

24 1. The amount of time spent by counsel is reasonable.

25 Under the lodestar approach, the court should first decide whether the amount of time
 26 reported by counsel is reasonable. With this motion, counsel for Plaintiffs and the Settlement
 27 Class have submitted declarations setting forth detailed summaries of the substantial work

1 counsel performed from inception of the litigation to the filing of the instant motion. *See* Terrell
 2 Decl. ¶¶ 16-33; Joint Declaration of Rob Williamson and Kim Williams in support of Motion for
 3 Attorneys' Fees, Costs, and Service Awards ("Williamson/Williams Decl.") ¶¶ 13-15;
 4 Declaration of Michael F. Ram in support of Motion for Attorneys' Fees, Costs, and Service
 5 Awards ("Ram Decl.") ¶¶ 8-14 and Exs. A-C.

6 Since the inception of this case more than three years ago, counsel have worked
 7 diligently to prosecute this action on behalf of the Settlement Class. Counsel engaged in
 8 substantial written discovery, including filing several motions to compel to present disputed
 9 discovery issues to the Court. *See* Terrell Decl. ¶¶ 17, 24; Williamson/Williams Decl. ¶ 13.
 10 Counsel reviewed over seventy-five thousand pages of documents and took five depositions.
 11 Terrell Decl. ¶ 25. Counsel also fully briefed a class certification motion, a process that clarified
 12 the evidence and crystalized the claims and defenses. *Id.* ¶¶ 17, 28. Finally, Plaintiffs responded
 13 to Defendants' motion to dismiss, and after the Court granted Defendants' motion, successfully
 14 moved for reconsideration. *Id.* ¶¶ 17, 29. It was only after Plaintiffs were successful on their
 15 motion for reconsideration that the parties were able to settle this action. *Id.* ¶ 29.

16 In total, counsel dedicated over 1,200 hours to the investigation, development, litigation,
 17 and resolution of this case. *See* Terrell Decl. ¶ 17; Williamson/Williams Decl. ¶ 13; Ram Decl.,
 18 Ex. B. And, as in every case, counsel will spend additional hours to see this case through to its
 19 final resolution, including the work necessary to prepare the motion for final approval, attend the
 20 hearing on final approval, and ensure the claims process is properly carried out.

21 Throughout this case, counsel prosecuted Plaintiffs' claims efficiently and effectively.
 22 Knowing it was possible they would never be paid for their work, counsel had no incentive to act
 23 in a manner that was anything but economical. *See Moreno v. City of Sacramento*, 534 F.3d
 24 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency
 25 cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the
 26 amount of the fee."). That said, counsel took their charge seriously and endeavored to represent

1 the interests of the Settlement Class Members to the greatest extent possible. Counsel submit that
 2 the over 1,200 hours underlying this fee application were reasonably spent.

3 2. Counsel's hourly rates are reasonable.

4 In determining a reasonable hourly rate, courts look at the prevailing market rates in the
 5 relevant community, which is the forum in which the district court sits. *Gonzalez v. City of*
 6 *Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). "In the instant case, the court will consider
 7 prevailing market rates in the Bay Area, which falls within the Northern District of California."
 8 *Rosado v. Ebay Inc.*, No. 5:12-cv-04005-EJD, 2016 WL 3401987, at *7 (N.D. Cal. June 21,
 9 2016). In this district, courts typically approve as reasonable hourly rates billed by partners up to
 10 \$800, and by associates up to \$510. *See In re Magsafe Apple Power Adapter Litig.*, No. 5:091-
 11 CV-01911-EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) (citing *Armstrong v. Brown*,
 12 805 F. Supp. 2d 918, 920-21 (N.D. Cal. 2011) (finding that a range of \$560 to \$800 was a
 13 reasonable rate for partners, \$285 to \$510 for associates, \$200 to \$240 for paralegals, and \$150
 14 to 185 for litigation support staff); *see also Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD,
 15 5:12-CV-04009-EJD, 2014 WL 4273358, at *7-8 (N.D. Cal. Aug. 29, 2014) (finding hourly rates
 16 ranging from \$325 to \$775 for attorneys and up to \$305 for paralegals reasonable); *In re Google*
 17 *Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1136-37 (N.D. Cal. 2015), *aff'd* 869 F.3d
 18 737 (9th Cir. 2017) (approving lodestar calculations using rates for attorneys ranging from \$300
 19 to \$685, with a 2.2 multiplier).

20 Here, as set forth in counsel's declarations, the lodestar calculations of counsel are based
 21 on reasonable hourly rates in the range typically approved in this district. *See* Terrell Decl. ¶ 19;
 22 Williamson/Williams Decl. ¶ 12; Ram Decl. ¶ 9. Counsel set their rates for attorneys and staff
 23 members based on a variety of factors, including, among others: the experience, skill and
 24 sophistication required for the types of legal services typically performed; the rates customarily
 25 charged in the markets where legal services are typically performed; and the experience,
 26 reputation and ability of the attorneys and staff members. *See* Terrell Decl. ¶ 18. The rates
 27

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1 charged for attorneys and staff members working on this matter range from \$225.00 to \$850.00,
 2 with the majority of the work performed by Ms. McEntee at an hourly rate of \$575.00; Ms.
 3 Ferguson at an hourly rate of \$550.00; Ms. Terrell at an hourly rate of \$725.00; Mr. Williamson
 4 at an hourly rate of \$650.00; and Mr. Ram at an hourly rate of \$850.00. *See* Terrell Decl. ¶ 17;
 5 Williamson/Williams Decl. ¶ 13; Ram Decl., Ex. B. Moreover, these are the hourly rates counsel
 6 charge in similar matters, and state and federal courts in other contingent matters, including
 7 courts in this district, have approved settlements involving similar hourly rates. *See* Terrell Decl.
 8 ¶ 19; Ram Decl. ¶ 9; Williamson/Williams Decl. ¶ 12;

9 Because counsel's hourly rates are in line with rates approved in similar cases in this
 10 district, counsel's hourly rates are reasonable and appropriate for calculating the lodestar. *See*
 11 *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) (affidavits by plaintiffs' counsel
 12 and fee awards in other cases are sufficient evidence of prevailing market rates).

13 3. Counsel's requested fee reflects a "negative" multiplier.

14 A negative multiplier "strongly suggests the reasonableness of the negotiated fee."
 15 *Rosado v. Ebay Inc.*, No. 5:12-cv-04005-EJD, 2016 WL 3401987, at * 8 (N.D. Cal. June 21,
 16 2016) (involving a negative multiplier of .54); *see also Gong-Chun v. Aetna*, No. 1:09-CV-
 17 01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. Jul. 12, 2012) (holding that a negative
 18 multiplier of .79 suggests that the negotiated fee award is reasonable); *Chun-Hoon v. McKee*
 19 *Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (reasoning that a negative multiplier
 20 suggests a reasonable and fair valuation of the services provided by counsel).

21 Here, counsel seek an attorneys' fee and cost award of \$150,000, which is substantially
 22 less than counsel' lodestar of \$786,985.40. Thus, the fee requested by counsel already reflects a
 23 "negative" multiplier of 0.19 on their total lodestar incurred [$\$786,985.40 \div \$150,000 = 0.19$].
 24 The negative multiplier is likely to go down further given that counsel expect to expend
 25 additional hours seeing this case through to final resolution. In light of the range of multipliers
 26 approved by courts within this Circuit, counsel's fee request, reflecting a "negative" multiplier
 27

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1 equal to less than half of counsel's lodestar, is reasonable based on the contingency of the fee
 2 and the quality of the work performed.

3 **D. Counsel's fee request reflects a reasonable percentage of the Settlement's estimated
 4 total value.**

5 The percentage-of-recovery method also supports counsel's requested fee because the
 6 requested fee represents a reasonable percentage of the Settlement's estimated total value.
 7 Depending on whether Settlement Class Members submit claims for certificates or cash, the
 8 Settlement's value ranges from \$523,520 to \$939,170.⁴ Further, the high claims rate for this type
 9 of case indicates that Settlement Class Members believe the Settlement offers them a valuable
 10 benefit. Plaintiffs request an award of \$150,000, approximately \$40,000 of which will be used to
 11 reimburse Plaintiffs' counsel for the out-of-pocket costs incurred prosecuting this litigation. The
 12 remaining \$110,000 fee amounts to between 11.7% and 21% of the total Settlement value.⁵

13 This Court has found the percentage of the fund cross check to be reasonable in a similar
 14 case. *See Williamson v. McAfee, Inc.*, No. 5:14-cv-00158-EJD, ECF Dkt. No. 114, at *2 (N.D.
 15 Cal. Feb. 3, 2017) (approving \$2.3 million attorney fee award in certificate settlement where
 16 class members received certificates or cash worth, at most, \$11.50). Indeed, this range is well
 17 below percentages often approved by courts in this circuit, especially when performing a
 18 "crosscheck" on the lodestar method. *See, e.g., Khanna v. Intercon Sec. Sys.*, 2014 WL
 19 1379861, at *12 (E.D. Cal. Apr. 8, 2014) (noting the benchmark in the Ninth Circuit is 25% but
 20 that courts have approved fee awards as high as 33% of the fund); *Garcia v. Gordon Trucking,*
 21 *Inc.*, No. 10-324, 2012 WL 5364575, at ** 3, 10 (E.D. Cal. Oct. 31, 2012) (33% approved where
 22 "Class Counsel litigat[ed] this matter for over two-and-a-half years without any compensation");
 23 *Singer v. Becton Dickinson & Co.*, No. 08-821, 2010 WL 2196104, at ** 2, 9 (S.D. Cal. Jun. 1,
 24 2010) (33 1/3%); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010)

25 ⁴ \$523,520 = Cash Value (\$332,520) + Fees and Costs (\$150,000) + Service Awards (\$12,000) +
 26 Notice Expenses (\$29,000); \$939,170 = Cash Value Certificates (\$748,170) + Fees and Costs
 (\$150,000) + Service Award (\$12,000) + Notice Expenses (\$29,000).

27 ⁵ \$110,000 = 21% of \$523,520 and 11.7% of \$939,170.

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1 (33.3%); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (33.33%).

2 Counsel achieved an excellent result for the Settlement Class. To date, nearly 40% of the
 3 Settlement Class Members have submitted claims. Counsel were confident in their ability to
 4 succeed at class certification and at trial. Nevertheless, success was by no means guaranteed,
 5 especially considering Defendants' vigorous opposition, the strength of their consent defense,
 6 and the complexity of the issues involved. Because counsel agreed to prosecute this case on
 7 contingency with no guarantee of ever being paid, they faced substantial risk if they proceeded to
 8 trial. *See* Terrell Decl. ¶¶ 31-33; Ram Decl. ¶ 9; Williamson/Williams Decl. ¶ 15. For these
 9 reasons, counsel's fee request should be granted.

10 **E. The payment of costs is fair and reasonable.**

11 Courts routinely allow reimbursement of out-of-pocket costs in class action settlements.
 12 *See e.g.*, *Arthur v. Sallie Mae, Inc.*, No. 10-198, 2012 WL 4076119, at *2 (W.D. Wash. Sep. 17,
 13 2012) ("The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of
 14 class action settlement.") (citing *Staton*, 327 F.3d at 974). In the Settlement Agreement,
 15 Defendants agreed to reimburse counsel for their costs.

16 Throughout the course of this litigation, counsel incurred out-of-pocket costs totaling
 17 \$41,065.40. *See* Terrell Decl. ¶ 22; Williamson/Williams Decl. ¶ 13; Ram Decl. Ex. C. The
 18 expenses counsel incurred include the following: (1) filing fees; (2) copying, mailing, and
 19 messenger expenses; (3) computerized legal research expenses; (4) factual investigation
 20 expenses; (5) expert fees; (6) transcript fees; (7) mediation fee; and (8) travel expenses for
 21 depositions, hearings, and mediation. Terrell Decl. ¶ 22; Williamson/Williams Decl. ¶ 13; Ram
 22 Decl. Ex. C. Counsel put forward these out-of-pocket costs without assurance that they would
 23 ever be repaid. These expenses were reasonably incurred in light of the work performed, the
 24 issues presented, and the results obtained. *See In re Immune Response Sec. Litig.*, 497 F. Supp.
 25 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs,
 26
 27

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1 travel expenses, postage, telephone and fax costs, computerized legal research fees, and
 2 mediation expenses are reasonable and necessary expenses in class action litigation).

3 **F. The service awards requested for the named Plaintiffs are reasonable.**

4 Service awards compensating named plaintiffs for work done on behalf of the Settlement
 5 Class (also known as incentive awards) attempt to account for financial or reputational risks
 6 associated with litigation, and promote the public policy of encouraging individual plaintiffs to
 7 undertake the responsibility of representative lawsuits. *See Rodriguez v. West Publ'g Corp.*, 563
 8 F.3d 948, 958-959 (9th Cir. 2009); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal.
 9 2011) (“Incentive awards are fairly typical in class actions.”). In reviewing whether a service
 10 award is appropriate, the court should take in account “the actions the plaintiff has taken to
 11 protect the interests of the class, the degree to which the class has benefitted from those action,
 12 ... [and] the amount of time and effort the plaintiff expended in pursuing the litigation.” *Jones v.*
 13 *Agilysys, Inc.*, No: C 12-03516 SBA, 2014 WL 2090034, at *3 (N.D. Cal. May 19, 2014)
 14 (quoting *Staton*, 327 F.3d at 977) (ellipses and internal marks in original).

15 Unlike unnamed Settlement Class Members, who are passive beneficiaries of the
 16 representatives’ efforts on their behalf, named class representatives agree to be the subject of
 17 discovery, including making themselves available as witnesses at deposition and trial, and
 18 subject themselves to other obligations of named parties. Service payments, which serve as
 19 premiums in addition to any claims-based recovery from the settlement, promote the public
 20 policy of encouraging individuals to undertake the responsibility of representative lawsuits.

21 In this case, Plaintiff Alan Brinker has protected the interests of the Settlement Class for
 22 more than three years. Mr. Brinker actively assisted in the prosecution of this case and devoted
 23 hundreds of hours of his time. Brinker Decl. ¶ 2. He responded to Defendant Normandin’s
 24 Interrogatories, Requests for Production, and Requests for Admission and Defendant
 25 OneCommand’s Interrogatories, Requests for Production, and Requests for Admission. *Id.* He
 26 also actively assisted in counsel’s investigation both before and after filing the case, including
 27

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1 analyzing the financial status of Normandin's. *Id.* ¶ 3. He also sat for a deposition, attended
 2 mediation, actively participated in mediation and settlement discussions and thoroughly
 3 reviewed the Settlement Agreement. *Id.* ¶ 5. In addition, Mr. Brinker had a potential individual
 4 claim against Normandin's that he did not pursue in order to put the Class's interests first. *Id.* ¶
 5 6. Awards in this range have been approved in this district under similar circumstances.
 6 *Contreras v. Performance Food Grp., Inc.*, No. 4:14-CV-03380-PJH, 2016 WL 9138157, at *1
 7 (N.D. Cal. May 4, 2016) (approving service award “in the amount of \$10,000.00, for the
 8 initiation of this action, the substantial benefit conferred upon the Class, and the risks taken by
 9 stepping forward and prosecuting this action.”); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D.
 10 326, 336 (N.D. Cal. 2014) (approving \$10,000 service award where class representative
 11 consulted with counsel, attended mediation, contributed significant personal time, and award was
 12 paid directly by the defendant such that “class members will not fund the awards.”). Thus, a
 13 \$10,000 service award for Mr. Brinker is reasonable.

14 Likewise, Mr. Rugg and Ms. Sanders stepped forward to represent the Settlement Class
 15 and, in so doing, incurred risks in prosecuting this case. Since joining the lawsuit, they were
 16 ready and willing to participate in the litigation as needed. \$1,000 service awards for these two
 17 Plaintiffs are reasonable under the circumstances. *See Weeks v. Kellogg Co.*, No. CV 09-08102
 18 MMM RZX, 2013 WL 6531177, at *37 (C.D. Cal. Nov. 23, 2013) (approving \$5,000 service
 19 awards for each named plaintiff even though their involvement was “relatively minimal and not
 20 particularly burdensome”).

21 IV. CONCLUSION

22 For the reasons stated above, counsel respectfully request that the Court grant this motion
 23 and: (1) award counsel an amount of \$150,000 in attorneys' fees and expenses to be paid by
 24 Defendants; and (2) award a service payment of \$10,000 to Plaintiff Brinker and \$1,000 each to
 25 Austin Rugg and Ana Sanders, to be paid by Defendants.

26

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RESPECTFULLY SUBMITTED AND DATED this 12th day of January, 2018.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on January 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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